
STATE OF MINNESOTA
DEPARTMENT OF TRANSPORTATION

Administrative Reconsideration Hearing Request by
Forest Lake Contracting Pursuant to 49 C.F.R. Part 26
State Project Number 62-631-05

TRP/280/DBE/2011

ADMINISTRATIVE RECONSIDERATION PANEL DECISION

INTRODUCTION

This decision is issued pursuant to 49 C.F.R. Part 26 after a reconsideration hearing held on August 31, 2011 on the request of Forest Lake Contracting ("Forest Lake").¹ Minnesota Department of Transportation Office of Civil Rights ("MnDOT OCR") set a DBE participation Project goal of 6% for the State Project Number 62-631-05 ("Project").² Forest Lake was the apparent low bidder ("ALB") on the Project and submitted documentation to MnDOT OCR indicating that it achieved 3.4% DBE commitment for the Project and also submitted documentation of its good faith efforts to MnDOT OCR on June 2, 2011.³

By letter dated July 28, 2011 ("bid rejection letter") MnDOT OCR informed Forest Lake that it has not demonstrated adequate good faith efforts to meet the Project's DBE goal. Forest Lake requested a reconsideration of MnDOT OCR's decision.

MnDOT Office of Chief Counsel scheduled a reconsideration hearing by a panel of three MnDOT officials. The three panel members had no role in the MnDOT OCR's decision to reject Forest Lake's bid as non-responsible. The panel informed the parties in writing of the location, time duration, and their rights at the hearing.⁴ Erik M. Johnson, Assistant Attorney General represented the MnDOT OCR and Theodore V. Roberts, Attorney-at-law, Fabyanske, Westra, Hart & Thompson, P.A. represented Forest Lake. Both Forest Lake and MnDOT OCR had equal opportunities to present their respective positions.

At the hearing, MnDOT OCR made its presentation based on an outline marked as MnDOT OCR exhibit A. Forest Lake marked its written argument dated August 31, 2011 as Forest Lake exhibit A.

¹ Letter dated August 8, 2011 from Trishia Carlson to Deputy Commissioner Bernard Arseneau.

² Bid rejection letter at 1.

³ MnDOT OCR exhibit 2, 3, and 4.

⁴ Notice dated August 18, 2011.

The panel made its decision based on the record made available by both parties, arguments made at the reconsideration hearing on August 31, 2011, and the following analysis.

ARGUMENTS

1. Forest Lake made four procedural objections: 1) the contracting authority in this project is the city or the county and therefore, there is no statutory basis for MnDOT OCR to impose additional hurdles or burdens on the contractor; 2) the federal regulations require a meeting and discussion with a reconsideration official and this reconsideration is held by a panel of three members; 3) because there are disputed facts, this is a contested case hearing under Administrative Procedure Act and therefore, Forest Lake should be allowed to cross-examine or ask questions from Mary Prescott, the director of MnDOT OCR who made the original decision; 4) because Mr. Richard Varco is representing MnDOT OCR and Mary Prescott in a constitutional challenge to the DBE program, he cannot objectively advise the panel.⁵

2. Forest Lake made three broad non-procedural arguments: MnDOT OCR's decision was illogical, arbitrary and capricious; MnDOT OCR ignored Forest Lake's good faith efforts, required Forest Lake to engage in bid shopping and also held Forest Lake to a heightened standard; and Forest Lake made good faith efforts under the federal regulations.⁶

3. MnDOT OCR made three main arguments in support of its position: 1) MnDOT OCR weighed each factor as mentioned in the federal regulations subjectively and applied to the facts in this case and did not use Appendix A as a check list; 2) Forest Lake failed in the areas of negotiation, de bundling, offering assistance to DBEs, recruitment and placement of DBEs, and the performance of other bidders; and 3) MnDOT OCR is not advocating bid shopping but rather entering into negotiations with the DBEs that may or may not result in agreements or accepting the DBE bids.⁷ MnDOT OCR did not respond to Forest Lake's procedural arguments.

PANEL'S FINDINGS AND CONCLUSIONS

1. Forest Lake questioned MnDOT OCR's right to make responsibility determinations

⁵ Transcript ("Tr.") 7-13.

⁶ Tr. 15- 28.

⁷ Tr. 42- 69.

in the DBE program when the contracting authority is a city or county.⁸ Although MnDOT is not the project owner in this case, MnDOT receives the federal funds for this project and makes them available to the local government that owns the project via an "agency" agreement. As the recipient of federal funds, MnDOT is obligated to ensure that the conditions imposed by the federal government on the use of those funds are fulfilled. One of the conditions is that MnDOT, not the local government, must decide whether the ALB has complied with the DBE regulations. If MnDOT determines that the ALB has not met the DBE goal, or made adequate good faith efforts to do so, MnDOT will not, indeed cannot, approve the use of federal funds for the project in question. It will ultimately be up to the project owner to award or not award the contract, which may depend on their ability to substitute local funds for the federal funds. MnDOT is merely carrying out the requirements under the applicable federal regulations, and has not imposed "additional" burdens or hurdles.

2. The Panel has considered Forest Lake's concerns about the Panel's role, its responsibilities and the process it uses to fulfill its obligations under 49 C.F.R. §26.53. Forest Lake made an objection to having three panel members instead of one reconsideration official. The Panel was constituted to meet the requirements in §26.53 cited above. That section provides that an ALB must be given "an opportunity for administrative reconsideration" by an official who did not take part in the original decision. Each member of the panel has written delegated authority from MnDOT's Deputy Commissioner to conduct and decide reconsiderations under section 26.53. MnDOT sees nothing in the regulations that precludes a recipient from appointing a panel to serve as its "Reconsideration Official." No Panel member had any involvement in OCR management or decision-making. The federal regulations set minimum requirements for the administrative reconsideration process and MnDOT has met those requirements. MnDOT has actually chosen to ensure more impartiality and deliberation by assigning a panel consisting of three officials to serve as the "reconsideration official" to hear reconsideration requests.

3. Forest Lake asked the Panel whether it was "intended to be neutral and impartial" and made an objection to Assistant Attorney General Richard Varco's role in the reconsideration process. Mr. Varco has been assigned to advise the panel on legal issues that arise during the hearings. Forest Lake argues that since Mr. Varco has also been assigned to represent OCR Director Mary Prescott in a district court constitutional challenge to the DBE program, this creates an "appearance of bias and a conflict of interest," possibly violating Forest Lake's due process rights.⁹ In light of this concern, Mr. Varco did not participate when the panel made this decision. Instead, he sought guidance

⁸ Tr. 13-14.

⁹ Tr. 10-11.

reconsiderations conducted under 49 C.F.R. §26.53. In addition, the plain language of the DBE regulation clearly allows agency employees to serve as Reconsideration Official, provided only that such employees "did not take part in the original decision."

6. Forest Lake makes several statements about MnDOT OCR's methods, processes and the way it arrives at decisions and the time it takes to communicate its decisions to reject a bid for failure to make good faith efforts.¹¹ Such statements raise issues that are not within the scope of the Panel's charge from the department. Any complaints about MnDOT OCR or its performance would be more appropriately addressed to those in the department who are responsible for oversight of MnDOT OCR. This panel was constituted for the sole purpose of reconsidering a MnDOT OCR decision concerning a specific contract award, and the panel was given no other authority over the manner in which MnDOT OCR conducts its business.

7. MnDOT OCR does not dispute the adequacy of Forest Lake's solicitation efforts or its follow up action.¹² Forest Lake identified portions of work to be performed by DBEs in the following areas: clearing and grubbing; trucking; signs and traffic control; sawing; bituminous paving; modular block wall; concrete curb/walk/drives; electrical supplies for signal and lighting; directional boring; fencing; sodding/restoration; and striping.¹³

8. MnDOT OCR does not dispute the adequacy of Forest Lake's follow up action after solicitation.¹⁴ In fact, Forest Lake's follow up action resulted in additional DBE participation.¹⁵ MnDOT OCR does not dispute that Forest Lake also de-bundled the electrical work.¹⁶

9. Forest Lake summarized its negotiation efforts as follows: discussed the plans with Lucas Company; provided the breakdown of bid items to Carlo Lachmansingh and B & L supplies; and contacted Frontier in an attempt to quote the small gas pump demolition item.¹⁷ Forest Lake accepted DBE quotes from Highway Solutions, Inc., Lucas Company LLC, Povolny Specialties, and Stonebrook Fence, Inc.¹⁸ Had Forest Lake either accepted or at least entered into further negotiations with Airfresh Industries and Ace Hydro Seeding, MnDOT OCR might have found in Forest Lake's favor on this aspect though that is not

¹¹ Tr. 28-29.

¹² Bid rejection letter at 3 and 8.

¹³ *Id.* at 4.

¹⁴ *Id.* at 3, 4, and 8.

¹⁵ Forest Lake accepted a quote from Lucas Company on the day of bidding. MnDOT OCR exhibit 4 p. 2.

¹⁶ Bid rejection letter at 4.

¹⁷ MnDOT OCR exhibit 4 – Recap of Good Faith Efforts for Project; Bid rejection letter at 1, 3, and 4.

¹⁸ Bid rejection letter at 1.

certain. The panel, based on the facts of this case, concludes that Forest Lake's overall efforts to negotiate with the interested DBEs were adequate. By this determination, the panel is not affirming Forest Lake's rejection of Airefresh Industries and Ace Hydro Seeding DBE quotes or its failure to pursue further negotiations with them.

10. The panel rejects Forest Lake's argument that negotiating with the DBEs in an attempt to get a lower quote amounts to bid-shopping. This panel addressed the issue of bid shopping in the decision of Administrative Reconsideration Hearing Request by Heselton Construction, LLC (TRP/279/DBE/2011) ("*Heselton*").¹⁹ The panel said in that case, "[b]id-shopping occurs when a contractor divulges a subcontractor's bid to other potential subcontractors to obtain lower bids from them. This is not the same as negotiating with a DBE. A prime contractor can enter into negotiations with a DBE in good faith without divulging the solicited bids or the prices. A DBE may quote a higher price due to a misunderstanding of the exact scope of the work involved; A DBE may be able to quote a lower price if it is able to quote only for portions of the work by de-bundling; A DBE may also be able to quote a lower price if it has some assistance in obtaining bonding, lines of credit or insurance as required by MnDOT or the contractor; It is also possible that a DBE may be able to quote a lower price if assistance to obtain necessary equipment, supplies, or materials is provided. A prime contractor cannot find out these circumstances unless it enters into discussions and negotiations with the DBEs who are interested."²⁰ The panel reiterates the distinction between negotiations as required by the federal regulations and bid-shopping, and the panel's reasoning on the issue of bid-shopping in *Heselton*.

11. Forest Lake did not reject any DBEs as unqualified to perform work on the Project. This is in favor of Forest Lake's good faith efforts.

12. Forest Lake did not offer financial or other assistance in its solicitation letter. In the absence of any evidence that the interested DBEs could have performed more work on the Project had Forest Lake offered assistance with finances, equipment and supplies, and given Forest Lake's overall good faith efforts in other areas, the panel does not consider this failure as fatal. Although the panel does not advocate or encourage the prime contractors to wait until DBEs request assistance, the panel finds no evidence that any interested DBE requested or indicated to Forest Lake the need for such assistance.

13. MnDOT OCR found Forest Lake's solicitation efforts to be adequate.²¹ The panel

¹⁹ Decision in the Administrative Reconsideration Hearing Request by Heselton Construction, LLC (TRP/279/DBE/2011) dated August 30, 2011. (On file at the Minnesota Department of Transportation.)

²⁰ *Id.* at 4-5.

²¹ Tr. 51.

agrees. Solicitation could not have been sufficient unless Forest Lake solicited the DBEs that were reasonably available to bid on the project. Forest Lake achieved this by using the MnDOT DBE Directory. MnDOT OCR argued that Forest Lake should have used the National Association of Minority Contractors and the Association of Women Contractors in Forest Lake's recruitment and placement efforts.²² But MnDOT OCR did not provide any evidence that doing so would have provided more information about the available DBEs. Accordingly, the panel finds that Forest Lake's efforts were sufficient in this regard.

14. Other bidders on the Project obtained an average DBE participation of 5.8%. Forest Lake's commitment was 3.4%. This alone, in the absence of other efforts, would weigh heavily against Forest Lake. But because Forest Lake's good faith efforts in the areas of solicitation, selecting portions of work, partial success in de-bundling, negotiation and providing information to the DBEs, the panel finds that Forest Lake's achievement below 5.8% is not dispositive.

15. MnDOT OCR viewed Forest Lake's decision to self-perform the electrical work and trucking as unreasonable and weighed this failure against Forest Lake's good faith efforts. Forest Lake stated that it is probably the only Minnesota paving contractor who can do its own electrical work.²³ Further, Forest Lake submitted that because they were short of electrical work and trucking, and electricians and drivers are being laid off, they decided to self-perform the electrical work and trucking.²⁴ If not for Forest Lake's other good faith efforts and the 3.4% DBE commitment, substituting DBE recruitment with self-performance may have worked against its good faith efforts. But having carefully considered the facts of this case and Forest Lake's reasons for doing so, the panel concludes that Forest Lake's decision to self-perform was not unreasonable. This conclusion does not mean that a prime contractor can self-perform when it is more profitable to do so or when it simply prefers to do so. But under the circumstances of this case, and because Forest Lake's other good faith efforts were adequate, the panel did not weigh this factor against Forest Lake.

16. The panel agrees with MnDOT OCR that it used a case-by-case analysis by applying the federal regulations to the specific facts of this case. The DBE program requires MnDOT to use wide discretion to ensure compliance with the federal guidelines. MnDOT OCR exercised its judgment on the adequacy of Forest Lake's good faith efforts and determined that Forest Lake failed to demonstrate adequate good faith efforts. The panel disagrees and

²² Tr. 52-53.

²³ Tr. 73.

²⁴ OCR exhibit 4 - Recap of Good Faith Efforts for Project; Tr. 27, 41.

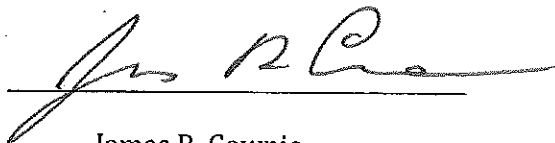
concludes that Forest Lake demonstrated good faith efforts as required by the federal regulations. This decision does not prescribe a litmus test to determine future cases. Instead, this decision is narrowly based on the facts of this case, the panel's weighing of various Appendix A factors, and the panel's view of the overall good faith efforts of Forest Lake. Appendix A to Part 26 of the federal regulations states "pro forma efforts are not good faith efforts to meet the DBE contract requirements. We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call: meeting quantitative formulas is not required." It is the panel's judgment that although Forest Lake could have done things differently or could have done more to increase DBE participation, its efforts were more than "pro forma" and did constitute good faith efforts as contemplated by the federal regulations.

Decision

The Panel concludes that Forest Lake was a responsible bidder and has satisfied the adequate good faith efforts as required by 49 C.F.R. Part 26. MnDOT OCR's determination dated June 23, 2011, rejecting Forest Lake's bid as non-responsible as of the Submission Due Date is reversed.

Sept 9, 2011

Date



James R. Cownie

For the MnDOT Administrative Reconsideration Panel
of August 31, 2011.